U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0459 BLA

ANTHONY B. JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MANALAPAN MINING COMPANY INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 07/28/2016
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Ronald C. Cox, Harlan, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton, PLLC), Pikeville, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-5914) of Administrative Law Judge Lystra A. Harris, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C.§§901-944 (2012). This case involves a claim filed on June 24, 2010.[1]

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with at least fifteen years of qualifying coal mine employment, and found that the evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4), and further found that employer did not rebut the presumption. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that claimant established over fifteen years of qualifying coal mine employment and the existence of a totally disabling respiratory or pulmonary impairment. Thus, employer asserts that the administrative law judge erred in finding invocation of the Section 411(c)(4) presumption established. Further, employer argues that the administrative law judge selectively analyzed the medical opinion evidence on rebuttal. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence,

[1] Claimant filed a previous claim in 2004, which was withdrawn prior to the issuance of a decision. Decision and Order at 2 n.3; Hearing Transcript (H.Tr.) at 20.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first challenges the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment. Claimant bears the burden of proof to establish the number of years actually worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Since the regulations provide only limited guidance for the computation of time spent in coal mine employment, *see* 20 C.F.R. §725.101(a)(32), the Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record considered as a whole. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Smith v. National Mines Corp.*, 7 BLR 1-803 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1983); *Maggard v. Director, OWCP*, 6 BLR 1-285 (1983).

In this case, the administrative law judge reviewed the relevant evidence and noted that claimant testified at deposition that he worked in underground mining for approximately twenty years, and testified at the hearing that he worked at least fourteen years in underground mining. Decision and Order at 3, 4. The administrative law judge further noted that claimant's coal mine employment form CM-911(a) listed employment at various coal mines for the years 1982-1984, 1984-1995, 1995-1999, and 1997-September, 2001. Decision and Order at 4; Director's Exhibit 3. Additionally, the administrative law judge considered claimant's Social Security Administration (SSA) earnings records that document coal mine employment with various employers for the years 1981-1982 and 1988-2001. Decision and Order at 4; Director's Exhibit 7. The administrative law judge credited claimant's testimony that his work was performed underground, and found that claimant's SSA records established that he "worked in coal mining from 1981 through 1982, and again from 1988 to September 2001; totaling between 15 and 16 years of coal mine work." *Id*. Thus, the administrative law judge concluded that claimant established at least fifteen years of underground coal mine employment. *Id.*

Employer contends that the administrative law judge erred in crediting claimant with more than the fourteen years of coal mine employment found by the district director

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

and stipulated to by the parties. Employer does not contest the administrative law judge's determination that claimant worked in coal mine employment from 1988-September 2001. Rather, employer asserts that claimant did not work "steadily and consistently" in the coal mining industry until 1988, and that his SSA records support a finding of only fourteen years of coal mine employment, as they show "very low" wages earned in the years 1981 and 1982. Employer's Brief at 7, 8.

Contrary to employer's argument, the parties stipulated to *at least* fourteen years of coal mine employment. *See* Hearing Transcript (H.Tr.) at 4-6. Moreover, the administrative law judge was not bound by the district director's findings, but properly adjudicated the contested issue of the length of claimant's coal mine employment. *See* Director's Exhibits 36 at 4, 52. We also reject employer's argument that the administrative law judge erred in relying on claimant's SSA records to credit him with coal mine employment for the years 1981-1982. Employer's Brief at 8; Director's Exhibit 7 at 2. The administrative law judge, as fact-finder, determines the weight to be accorded to both the documentary evidence and testimony. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 25 BLR 2-431 (6th Cir. 2013); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). In this instance, the administrative law judge permissibly relied on claimant's SSA earnings records, which reflect that claimant worked in coal mine employment from 1981-1982 and from 1988-2001, and employer has not identified error in the administrative law judge's reliance thereon.[4] *See Brumley v. Clay Coal Corp.*, 6 BLR 1-956 (1984); *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984). Because the administrative law judge's computation is supported by substantial evidence in the record as a whole, we affirm her finding that claimant established at least fifteen years of underground coal mine employment.[5] *See Muncy*, 25 BLR at 1-27; *Vickery*, 8 BLR at 1-430.

[4] In support of its argument, employer points out that claimant testified that he performed construction work or was self-employed during "some" of the years when his Social Security Administration (SSA) records showed no earnings. *See* H.Tr. at 21; Employer's Brief at 7. However, employer has not explained how this testimony conflicts with the administrative law judge's crediting of claimant's SSA records, which do show earnings of $3,725.31 in 1981 and $8,246.35 in 1982 from Eastover Mining, and do not reflect non-coal employment during those years. Moreover, the fact that claimant's 1981 and 1982 earnings are lower than his earnings from 1988-2001 does not itself demonstrate that claimant was not engaged full-time in coal mine employment in 1981 and 1982.

[5] Employer additionally argues that the administrative law judge made "inconsistent statements throughout her Decision and Order with regards to the number

Employer next maintains that the administrative law judge erred in finding invocation of the Section 411(c)(4) presumption established, arguing that "she found a pulmonary disability based upon one pulmonary function study simply because the other two were invalidated," and also found total disability based upon one arterial blood gas study, when two of the three studies of record revealed normal results. Employer's Brief at 10, 14. While employer challenges the administrative law judge's weighing of the pulmonary function and arterial blood gas studies, it has not identified specific error in the administrative law judge's overall finding of total respiratory or pulmonary disability at 20 C.F.R. §718.204(b). Nevertheless, we will address the administrative law judge's findings on total disability, as they had some effect on her weighing of the evidence on rebuttal of the Section 411(c)(4) presumption.

At Section 718.204(b)(2)(i), the administrative law judge considered pulmonary function studies obtained on September 30, 2010, October 5, 2010, and November 29, 2011. She determined that all of the studies produced qualifying[6] values, both before and after bronchodilation, but that Dr. Alam's tests obtained on September 30, 2010 and Dr. Broudy's tests obtained on October 5, 2010 were invalid. Decision and Order at 7-9; Director's Exhibits 11, 12, 44. As no physician questioned the validity of Dr. Dahhan's tests obtained on November 29, 2011, and Dr. Dahhan, a well-qualified physician, relied on the testing as valid, the administrative law judge considered the test valid. Decision and Order at 8. Employer concedes that it "has not called into question the validity of Dr. Dahhan's pulmonary function results." Employer's Brief at 4. Nonetheless, employer asserts it "can be inferred" that, because claimant's effort was suboptimal on the studies obtained by Drs. Alam and Broudy, Dr. Dahhan's testing is "possib[ly]" invalid as well.

---

of years the [c]laimant was employed as a miner." Employer's Brief at 8. After noting that the parties stipulated to at least fourteen years of coal mine employment, the administrative law judge considered the relevant evidence, concluded specifically that the record demonstrated between fifteen and sixteen years of underground coal mine employment, and found that claimant established at least fifteen years of qualifying coal mine employment. Decision and Order at 4. While employer correctly notes that the administrative law judge subsequently stated that claimant "established at least 39 years of underground coal mine employment," Decision and Order at 6, and that the parties stipulated to fifteen to sixteen years of coal mine employment, Decision and Order at 22, we discern no reversible error in the administrative law judge's seemingly inadvertent misstatements.

[6] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those table values. 20 C.F.R. §718.204(b)(2)(i), (ii).

Id. We reject employer's speculation as unsubstantiated in the record. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993). As substantial evidence supports the administrative law judge's findings at Section 718.204(b)(2)(i), we affirm her conclusion that the pulmonary function study evidence establishes a total respiratory or pulmonary disability.

At Section 718.204(b)(2)(ii), the administrative law judge considered arterial blood gas studies obtained on September 30, 2010, October 5, 2010, and November 29, 2011. Although the first two tests were non-qualifying, the administrative law judge gave "most weight" to the November 29, 2011 test, as it is the most recent of record, and found that the arterial blood gas studies "tend to establish disability." Decision and Order at 9. Contrary to employer's suggestion, the administrative law judge was not required to credit the evidence based on numerical superiority, and permissibly assigned "most weight" to the November 29, 2011 qualifying blood gas study, because it was the most recent test of record, and was taken more than a year after the two non-qualifying tests from September 30, 2010 and October 5, 2010. Decision and Order at 9. Because disability is measured by the miner's physical condition at the time of the hearing, *see generally Roberts v. W. Va. C.W.P. Fund*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996), the administrative law judge reasonably relied on the more recent evidence as being more probative of claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wetzel v. Director*, OWCP, 8 BLR 1-139 (1985). As substantial evidence supports the administrative law judge's finding that claimant's blood gas studies tend to establish disability at Section 718.204(b)(2)(ii), it is affirmed.

In consideration of the medical opinion evidence at Section 718.204(b)(2)(iv), the administrative law judge determined that Drs. Alam, Broudy, and Dahhan were all well-qualified to offer an opinion, and that they all relied on comparable and substantial smoking and coal mine employment histories. Decision and Order at 14. The administrative law judge acted within her discretion in deducting "some weight" from Dr. Alam's opinion, that claimant is disabled from a pulmonary standpoint, as she found that Dr. Alam did not specifically address whether claimant could perform his usual coal mine employment from a pulmonary standpoint, and he relied upon an invalid pulmonary function study. *Id.*; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Street v. Consolidation Coal Co.*, 7 BLR 1-65, 1-67 (1984). Similarly, the administrative law judge permissibly discounted Dr. Broudy's opinion because the physician did not address whether claimant's respiratory impairment was totally disabling when compared with the exertional requirements of claimant's usual coal mine employment, and Dr. Broudy stated that his and Dr. Alam's pulmonary function studies were invalid and unreliable for diagnostic purposes. *Id.*

Conversely, because Dr. Dahhan relied on valid pulmonary function and arterial blood gas studies and took into account the exertional requirements of claimant's coal mine employment as a scoop and bridge operator, the administrative law judge permissibly concluded that the opinion was well-reasoned and entitled to determinative weight. *Id*. We therefore affirm, as supported by substantial evidence, the administrative law judge's determination that the medical opinion evidence establishes total respiratory or pulmonary disability at Section 718(b)(2)(iv).

Weighing all relevant evidence together, the administrative law judge properly found that claimant established total respiratory or pulmonary disability at Section 718.204(b), and we affirm her finding as supported by substantial evidence. Decision and Order at 15; *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*., 9 BLR 1-236 (1987)(en banc). We, therefore, affirm the administrative law judge's determination that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4).

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[7] or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §725.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149 (2015)(Boggs, J., concurring and dissenting).

After determining that employer rebutted the presumed fact of clinical pneumoconiosis,[8] Decision and Order at 17-20, the administrative law judge considered the medical opinion of Dr. Alam, who diagnosed legal pneumoconiosis, and the contrary opinions of Drs. Broudy and Dahhan. The administrative law judge deducted "some

[7] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[8] As this finding is unchallenged, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

weight" from Dr. Alam's opinion because he did not rely on valid pulmonary function study results, and discredited the opinions of Drs. Broudy and Dahhan because she found that each was inconsistent with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions. Decision and Order at 20-21. The administrative law judge additionally found that Dr. Broudy neither had access to valid pulmonary function testing, nor adequately explained how he excluded coal dust exposure as an aggravating factor in claimant's respiratory condition. Decision and Order at 20. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis. *Id.*

Employer asserts that Drs. Broudy and Dahhan relied on multiple factors in concluding that claimant does not have legal pneumoconiosis, and contends that the administrative law judge selectively analyzed their opinions and provided invalid reasons for discounting them. Employer's Brief at 11-13. Employer's arguments lack merit.

It is the province of the finder-of-fact to evaluate and assess conflicting medical evidence, draw inferences, and assess probative value. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Rowe*, 710 F. 2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). The determination of whether a medical opinion is documented and reasoned is a credibility determination left to the administrative law judge, and we may not substitute our judgment. *See Moseley v. Peabody Coal Co.*, 769 F.2d 357, 8 BLR 2-22 (6th Cir. 1985).

In the present case, in light of Dr. Broudy's admission that his evaluation was "hampered" by the lack of valid ventilatory testing, Director's Exhibit 12, the administrative law judge permissibly assigned his opinion less weight on that basis. Decision and Order at 20; *see Street*, 7 BLR at 1-67. The administrative law judge also acted within her discretion in finding that the opinions of Drs. Broudy and Dahhan merited less weight because they relied on premises that are contrary to the regulations. Specifically, Dr. Broudy attributed claimant's chronic bronchitis entirely to smoking and eliminated the possibility that coal dust exposure could have aggravated that condition because claimant had not mined for nine years. Decision and Order at 20; Director's Exhibit 12. Similarly, Dr. Dahhan opined that claimant's obstructive impairment in the form of emphysema and chronic bronchitis is unrelated to coal dust exposure because claimant's pulmonary function decreased significantly since he was last examined in 2004, and claimant had not been exposed to coal dust during that time. Decision and Order at 21; Employer's Exhibit 2 at 12. As the regulations define pneumoconiosis as "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure," 20 C.F.R. §718.201(c), the administrative law judge

permissibly accorded the opinions of Drs. Broudy and Dahhan less weight. *See* 65 Fed. Reg. 79,971 (Dec. 20, 2000); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003).

Additionally, the administrative law judge was not persuaded by Dr. Dahhan's citation to medical literature questioning whether there is any dust-related increase in bronchitis in smokers and whether smoking and coal dust exposure cause emphysema through similar mechanisms, as the literature was contrary to the science credited by the DOL in preamble. Decision and Order at 21; *see* 65 Fed. Reg. 79,939, 79,943 (Dec. 20, 2000); 20 C.F.R. §718.201. Absent the type and quality of medical evidence that would invalidate the scientific studies found credible by the DOL in the preamble, a physician's opinion that is inconsistent with the preamble may be discredited. *See Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-492, 25 BLR 2-633, 2-645 (6th Cir. 2014); *see also Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, 25 BLR 2-255, 2-265 (4th Cir. 2013).

As substantial evidence supports the administrative law judge's decision to discredit the opinions of Drs. Broudy and Dahhan as to the existence of legal pneumoconiosis, it is affirmed. Consequently, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption of legal pneumoconiosis.[9] 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(2)(i).

Lastly, the administrative law judge permissibly found that because Drs. Broudy and Dahhan failed to provide well-reasoned opinions on the issue of legal pneumoconiosis, their opinions on the cause of claimant's totally disabling respiratory or pulmonary impairment were entitled to little weight. Decision and Order at 21-22; *see Ogle*, 737 F.3d at 1074, 25 BLR at 2-451. We, therefore, affirm the administrative law judge's finding that employer failed to rebut the presumed fact of disability causation, *see* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(2)(ii), and that claimant is entitled to benefits.

[9] Because the administrative law judge discredited the only medical opinions supportive of employer's burden on rebuttal, we need not consider employer's arguments regarding the weight accorded to the opinion of Dr. Alam. Decision and Order at 21; Employer's Brief at 13-14; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 556, 25 BLR 2-339, 2-349-50 (4th Cir. 2013)(Niemeyer, J., concurring); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge